In The

SUPREME COURT OF THE UNITED STATES

1979

No. 78-1710

BARTON DEAN FORD,

Appellant,

v.

STATE OF TEXAS,

Appellee.

On Appeal From the Comal County, Texas, Court-at-Law

JURISDICTIONAL STATEMENT

Barton D. Ford
Appellant, pro se
19 Summit Drive West
Wimberley, Texas 78676

March, 1979

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

There have been no written opinions, reported or unreported, in this case.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a criminal prosecution against appellant, Barton Dean Ford. Appellant was charged and convicted in the Comal County Court-at-Law of operating a motor vehicle on a public highway at a speed that was not reasonable and prudent in violation of Article 6701d, Section 166, TEX. REV. CIVIL STAT. (VERNON 1977). Section 166 also provides that speeds in excess of the posted, prima facie maximum lawful speed limit shall be prima facie evi-

dence of an unreasonable and imprudent speed. This latter provision was correctly interpreted in the jury charge as a presumption that speeds in excess of the posted speed limit are assumed to be unreasonable and imprudent. Appellant contended that the instructions were erroneous because the portion of Section 166 that provides for the presumption is repugnant to the Fourteenth Amendment to the Constitution of the United States. The decision of the Comal County Court-at-Law was in favor of the validity of Section 166.

Upon a jury verdict of guilty, punishment was set at fifty-five dollars, well below the Texas Court of Criminal Appeals jurisdictional minimum of one-hundred dollars. Appellant has, therefor, exhausted state appellate procedures.

(ii) The judgment or decree sought to be reviewed is the ruling of the Comal County Court-at-Law denying appellant's motion for a new trial. That ruling was issued on February 7, 1979. The notice of appeal was filed in the Comal County Court-at-Law, the court possessed of the record, on February 28, 1979.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Schroeder v. City of New York, 371 U.S. 208 (1962);
Hoyt v. Florida, 368 U.S. 57 (1961);
Ferguson v. Georgia, 365 U.S. 570 (1961);
Keerl v. Montana, 213 U.S. 135 (1909);
Wilson v. North Carolina, 169 U.S. 135 (1898).

(v) The validity of Article 6701d, Section 166, TEX. REV. CIVIL STAT (VERNON 1977) is here involved. The relevant parts of that statute are as follows:

Sec. 166. (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable

and prudent under the circumstances then existing. Except when a special hazard exists that requires lower speeds for compliance with paragraph (b) of this Section, the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this Section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

. . .

2. Seventy (70) miles per hour during the daytime and sixty-five (65) miles per hour during the nighttime for any passenger car, motorcycle, or motor-driven cycle on any State or Federal numbered highway outside any urban district, including farm- and/or ranch-to-market roads....

Other relevant state law provisionns are as follows:

Sec. 169B. (a) If the State Highway Commission finds that the facts specified in Subsection (b) of this section exist, it may enter an order establishing maximum prima facie speed limits of not more than seventy (70) miles per hour applicable to all highways in this state, including highways under the control of the Texas Turnpike Authority, incorporated cities and towns, and counties. An order entered under this section does not have the effect of increasing a speed limit on any highway. The limits established under this section are prima facie prudent and reasonable speed limits enforceable in the same manner as prima facie limits established under other provisions of this article....

(b) An order issued under Subsection (a) of this section is justified if the commission finds the following facts exist, which must be stated in the order:

(1) That a severe shortage of motor fuel or other petroleum product exists; and

(2) That the shortage was caused by war, national emergency or other circumstances; and

(3) That a reduction of speed limits will serve to foster conservation and safety; or

(4) The failure to alter state speed limits will prevent the state from receiving revenue for highway purposes from the federal government.

(c) Unless a specific speed limit is required by federal law or directive under threat of loss of federal highway funds then the State Highway Commission may not set maximum prima facie speed limits under this section of all vehicles below sixty (60) miles per hour.

The Texas Highway Commission found that fact (4) above existed on January 8, 1974, and has renewed this finding every ninety (90) days to present. The prima facie speed limit has accordingly been reduced to fifty-five (55) miles per hour in compliance with federal funding requirements. Texas Highway Commission Minute Order No. 68283.

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

(i) Does a state statute that provides for a presumption that speeds in excess of a posted, prima facie maximum lawful speed of fifty-five (55) miles per hour are assumed to be unreasonable and imprudent violate the Due Process clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

Barton Dean Ford, appellant herein, is a citizen of the United States and a resident of Wimberley, Hays County, Texas. On December 21, 1978, a complaint was filed in the 4th precinct of the Justice of the Peace Court, Comal County, Texas, charging appellant with operation a vehicle on a highway at a speed that was not reasonable and prudent under the circumstances existing. Appellant was convicted of this offense on December 21, 1978 and immediately posted an appeal bond, thereby perfecting his right

to a trial de novo in Comal County Court-at-Law.

A jury trial was held in Comal County Court-at-Law on January 31, 1979. Appellant waived his privilege against self incrimination and testified that he was in fact driving at the alleged speed of sixty-seven (67) miles per hour at the time and place alleged in the complaint. Appellant contradicted, however, the testimony of the state's witnesses, two Texas Highway Patrolmen, that the speed of sixty-seven miles per hour was unreasonable or imprudent under the curcumstances.

The trial judge instructed the jury in relevant part as follows:

> Our law provides that it shall be a violation of the law of this State for any person to operate a motor vehicle upon a public road in this State at a speed which was greater than was then and there reasonable and prudent under the conditions then existing, having regard to the actual and potential hazards. Said speed limit then posted on the public highway being assumed to be the then existing reasonable and prudent speed for travel on said highway. (emphasis supplied)
>
> Therefore, you are instructed that if you find and believe from the evidence beyond a reasonable doubt that on or about the 21st day of December, A.D. 1978, the Defendant, Barton Dean Ford, did drive on FM 306 at a speed in excess of the posted limit of 55 miles per hour, then you will find the defendant guilty as charged in the complaint.

Immediately prior to the reading of the instructions, appellant objected that the instructions cited above create a presumption of guilt upon a finding that appellant's speed exceeded fifty-five (55) miles per hour which does not pass Constitutional muster under the standard enunciated in Leary v. United States, 395 U.S. 6 (1969).

The jury found the defendant guilty and set punishment at fifty-five (55) dollars.

On February 7, 1979, appellant filed in the Comal County Court-at-Law a motion for a new trial on the grounds that the portion of Section 166 which provides that speeds in excess of the prima facie speed limit are prima facie evidence of an unlawful speed violates the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

Under federal Constitutional law, a statutory presumption violates the Due Process clause of the Fourteenth Amendment unless the presumption is logical, that is, unless there is a rational connection between the fact proven (speed in excess of the prima facie speed limit) and the fact presumed (an unreasonable or imprudent speed). Leary v. United States, supra; United States v. Romano, 382 U.S. 136 (1965); Gainey v. United States, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

It is clear from the face of the Texas Speed Statutes that the requisite rational connection is missing. Section 169B makes the prima facie speed limit soley a function of national energy policy. The sole finding upon which the Highway Commission has predicated the reduction in the prima facie speed limit from seventy (70) miles per hour to fifty-five (55) miles per hour is that "a specified maximum speed limit of 55 miles per hour is required by Federal law, and that unless the state of Texas establishes a maximum speed limit of 55 miles per hour the State of Texas is threatened with the loss of Federal Highway funds." Minute Order No. 68283.

It is significant that Section 169B does not permit the Highway Commission to reduce the prima facie speed limit below sixty (60) miles per hour if it only finds that such a reduction will foster fuel conservation and safety. Sec. 169B(c). The Commission must find that federal highway funds are threatened before the prima facie speed limit can be reduced below sixty (60) miles per hour.

The Texas presumption at issue here is not only illogical on its face, but empirical evidence shows that the presumption is irrational under the test articulated in Leary v. United States, supra:

> The upshot of Tot, Gainey, and Romano is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

395 U.S. at 36.

Using the language of the Leary Court, the presumption is unconstitutional unless it can at least be said with substantial assurance that the presumed fact (unreasonable or imprudent speed) is more likely than not to flow from the proved fact (speed in excess of fifty-five (55) miles per hour). Before testing the presumption, it is necessary to define "reasonable and prudent speed". The Texas Statutes do not define the phrase at all. The prima facie speeds merely function as part of a rule of evidence, giving no substance to the phrase "reasonable and prudent speed". Uptmore v. State, 116 Tex. Crim. 181, 32 S.W. 2d 74 (Tex. Comm'n App. 1930, opinion approved); Ratliff v. State, 114 Tex. Crim. 142, 25 S.W. 2d 343 (1929).

In absence of statutory definition, "reasonable and prudent speed" should be given its ordinary meaning. Ex parte Chernosky, 153 Tex. Crim. 52, 217 S.W. 2d 673 (1949). The New Hampshire Supreme Court provides the only appellate-level discussion of the ordinary meaning of "reasonable and prudent speed." George v. Smith, 105 N.H. 100, 193 A. 2d 16 (1963). In a case involving a statute similar to Texas' section 166, the New Hampshire court held that a reasonable and prudent speed is "the speed at which the ordinary person of average prudence would drive an automobile under the the same or similar circumstances." 105 N.H. at 101, 193 A.2d at 17. Texas courts construing similar language in

civil cases seem in accord with the New Hampshire court's definition. Cameron Compress Co. v. Whitington, 280 S.W. 2d 527 (Tex. Comm'n App. 1926, judgmt adopted); Sullivan & Davis v. Guana, 5 S.W. 2d 242 (Tex. Civ. App.--Eastland 1928, no writ). The conduct proscribed by section 166, therefor, is driving faster than an ordinary man of average prudence would drive under the same conditions.

Applying the Leary test to the section 166 presumption renders the following issue: Can it be said with substantial assurance that persons driving in excess of fifty-five (55) miles per hour on Texas highways are driving faster than an ordinary person of average prudence would drive?

A report prepared by the Texas State Department of Highways and Public Transportation, Transportation Planning Division (Defendant's Exhibit #1 at trial) shows that, during the third quarter of 1978, eighty per cent of all vehicles on Texas highways were traveling at speeds in excess of fifty-five (55) miles per hour. (Speed Station Monitoring Summary, Quarter ending September 30, 1978). Obviously, it would be a mathematical impossibility for eighty per cent of all drivers to be driving faster than the average man of ordinary prudence. It is thus provable to a logical certainty that the section 166 presumption does not pass the Constitutional test articulated in Leary. The conclusion that appellant drove at an unreasonable and imprudent speed does not logically flow from the fact that appellant was not among the slowest twenty per cent of Texas drivers.

CONCLUSION

This appeal calls into question the Constitutional validity of a Texas law that impacts directly upon the conduct of millions of Texas drivers. And while the injustice created by the section 166 presumption may not lead to an unconstitutional deprivation of life or liberty in the individual case, the unconstitutional deprivation of property that resuts from

this presumption is staggering in the aggregate. But because of the one-hundred (100) dollar jurisdictional minimum of the Texas Court of Criminal Appeals, it is unlikely that any appellate court other than the Supreme Court of the United States will ever have the opportunity to review the section 166 presumption, at least in so far as it applies to speeds under seventy (70) miles per hour. The importance of reviewing a statute that clearly violates Due Process rights and which affects the conduct of millions of persons daily is manifest. Appellant respectfully requests that the Court give serious consideration to the issue raised in this case.

Respectfully submitted,

Barton Dean Ford
Appellant, pro se

March, 1979